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No. 90-1705

In The

# Supreme Court of the United States

October Term, 1990

ELI MIRZOEFF,

*Petitioner,*

*vs.*

MOTI NAMDAR,

*Respondent.*

*On Petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Judicial Department*

## BRIEF IN OPPOSITION FOR RESPONDENT

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No. 90-1705

In The

# Supreme Court of the United States

October Term, 1990

ELI MIRZOEFF,

*Petitioner,*

*vs.*

MOTI NAMDAR,

*Respondent.*

*On Petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Judicial Department*

## BRIEF FOR RESPONDENT IN OPPOSITION

## STATEMENT OF THE CASE

Petitioner and respondent, both members of the Diamond Dealers Club (DDC), submitted a controversy to a private, voluntary arbitration before an arbitration tribunal of the DDC. The five-member neutral arbitration panel was selected by the parties, and consisted of three chairman and two additional arbitrators.

It was undisputed that respondent had delivered a sapphire to petitioner on a "memorandum" basis. A memorandum serves as a receipt and a contract and its terms may not be contradicted by parol. *Lipschutz v. Gordon Jewelry Corp.* 373 F. Supp. 375, 387 (S.D. Tex. 1974). Respondent commenced the arbitration proceeding when petitioner refused to return the gem. Petitioner contended that he had returned the gem to respondent's brother-in-law in a chance encounter in an elevator but neglected to request return of the signed memorandum. Respondent produced the signed original memorandum at the arbitration (6ra).[1] The arbitrators held hearings over the course of two days and both parties, represented by their respective counsel, offered testimony and conducted cross-examination (22a, 4ra). Petitioner was represented by the former general counsel to the DDC (24a).

The panel unanimously rendered an award in respondent's favor. A key factor compelling the award was petitioner's failure to comply with a DDC by-law relating to custom and usage. Specifically, Section 4 of Article XIX of the by-laws provides as follows:

> Memorandums. No goods shall be given or received without a signed memorandum, and any return of goods must be acknowledged in writing or by the return of the signed memorandum.

(6ra).

Respondent commenced an Article 75 proceeding under the New York Civil Practice Law and Rules to confirm the arbitration award. Petitioner opposed confirmation on the following grounds: that the arbitrators were *all* biased against petitioner based on

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1. The designation "ra" preceded by a page number refers to respondent's appendix; "a" refers to petitioner's appendix.

petitioner's subjective interpretation that he violated the tenets of his religious faith by initiating criminal charges against a fellow member of his faith; that errors were committed in evidentiary rulings; that one of the arbitrators allegedly conducted an "independent investigation"; and that petitioner had not entered into a contract with respondent (10-13a).[2]

In addition, petitioner alleged that one of the five arbitrators, Kaufman, allegedly asked to purchase a diamond ring he was wearing. This allegation was devoid of any detail except that petitioner rejected the arbitrator's offer as "too low". The ask and bid prices were not furnished. Significantly, petitioner had continued with the arbitration without raising any objection and without informing anyone of the allegations.

In response to this allegation, Kaufman submitted a detailed factual affidavit denying that any negotiations took place during the pendency of the arbitration proceeding (20-23a, 4-5ra). Petitioner did not reply to the arbitrator's affidavit although he submitted an affirmation by his former attorney which did not contradict Kaufman's affidavit (24-25a).

The trial court rejected petitioner's latter claim on several grounds (10-13a). The court found that petitioner had failed to sustain his burden of proof with respect to the arbitrator's alleged misconduct by a standard of "clear and convincing" evidence. Additionally, the court held that under New York law, a disclosed relationship (in contrast to an undisclosed relationship) between a party and an arbitrator may not form the basis for vacatur of the award on the grounds of "partiality" if the objecting party selected the arbitrator and voiced no objection to the disclosed facts. The facts complained of here, were clearly disclosed to

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2. These grounds were rejected by the lower court and the Appellate Division and are not presented for review to this Court.

petitioner (although undisclosed to respondent). Finally, the lower court held that petitioner waived his claim by continuing to proceed with the arbitration without objection. The court found that the doctrine of waiver was particularly appropriate where Kaufman's vote was surplusage in a five to none decision.

A five-member panel of the Appellate Division unanimously affirmed the order and judgment of the trial court. Significantly, that court made the following key finding of fact:

> Upon our review of this record, we conclude that Mirzoeff has not sufficiently demonstrated *his allegations of the arbitrator's misconduct*.

(6a) (emphasis added).

The frivolous and misleading nature of the petitioner's present position is characterized by his allegation that the reference in the court's decision to the failure of proof refers to issues "not presented herein" (Pet. for Cert. at 8). The Appellate Division, clearly, and beyond any shadow of a doubt, did find a failure of proof with regard to petitioner's "allegations of the arbitrator's misconduct."

Petitioner's argument that this Court is not bound by the Appellate Division's factfinding and request that this Court "scrutinize" the record is disingenuous in light of the petitioner's failure to reproduce here the complete record, or at the very least, the relevant parts thereof. By omitting over ninety percent of the record and taking the cutting knife to affidavits in presenting isolated paragraphs of affidavits out of context, petitioner cannot be serious about having this Court "scrutinize" the record. Petitioner's "statement of facts" deviates from the facts presented in the record before the lower court and the Appellate Division. For example, it was not "undisputed" that Kaufman negotiated

with petitioner for the sale of a ring while the arbitration was pending.

Finally, and of critical importance on this application, petitioner has not preserved his Fourteenth Amendment due process violation claim since this claim was never raised at any level of the proceedings. While there may have been a casual and indirect reference to the "due process clause" in petitioner's appellate brief, there was certainly no mention of the Fourteenth Amendment to the United States Constitution. Petitioner never briefed this point, and petitioner did not raise these points in his proposed certified questions on motions for leave to appeal to the Appellate Division and to the Court of Appeals (1-3ra).

The Fourteenth Amendment due process claim was first raised on petitioner's motion for *rehearing* of the Court of Appeals' denial of his motion for leave to appeal to that court. In the motion for rehearing, petitioner also moved for amendment of the court's remittitur, to provide that the constitutional issue had been "necessarily raised and considered." That motion was denied.

## REASONS FOR DENYING THE WRIT

### I.

### Absence of State Action

It is undisputed that a private, *voluntary* arbitration such as the one herein cannot be considered state action for the purposes of a due process deprivation claim under the Fourteenth Amendment. *Austern v. Chicago Board Options Exchange, Inc.* 716 F. Supp. 121, 125 (S.D.N.Y. 1988) (where the District Court relied upon *N.C.A.A. v. Tarkinian*, 488 U.S. 179, 197-198 (1988) "protections of the Fourteenth Amendment do not extend to private conduct abridging individual rights."), *aff'd on other grounds*, 898 F.2d 882 (2nd Cir.), *cert. denied*, ___ U.S. ___, 112 L. Ed. 2d 107 (1990); *F.D.I.C. v. Air Florida System Inc.*, 822 F.2d 833, 842 at fn. 9 (9th Cir., 1987), *cert. denied*, 485 U.S. 987 (1988); *Elmore v. Chicago Illinois Midland Ry. Co.*, 782 F.2d 94, 96 (7th Cir. 1986).

The mere confirmation of the arbitration award by the state court standing alone, cannot be considered state action. A party who has obtained a state court order or judgment is not engaged in "state action" merely because it used the state court legal process. *Cobb v. Georgia Power Co.*, 757 F.2d 1248, 1251-1253 (11th Cir. 1985).

The Circuit Court in *Cobb, supra*, in considering state action under a § 1983 action, distinguished *Dennis v. Sparks*, 449 U.S. 24 (1980) relied on by petitioner, since that case involved an allegation of a conspiracy between a state officer and a private party. The court in *Cobb*, concluded that "something more" than a state judgment standing alone is required to satisfy the presence of "state action". *Id.* at 1251.

The record here shows no state action beyond the mere ministerial act of confirmation of a private arbitration award.

Similarly, in *United States v. American Soc. of Composers, Authors & Publishers*, 708 F. Supp. 95, 96-97 (S.D.N.Y. 1989) the District Court rejected petitioner's due process violation claim due to his failure to demonstrate any state action. Petitioner's claim of state action was premised upon the court's approval of a consent decree which required the establishment of a grievance procedure.

The District Court there rejected petitioner's claim in reliance on and citing from the decision in *Mount St. Mary's Hospital v. Catherwood*, 26 N.Y. 2d 493, 500, 260 N.E. 2d 508, 511, 311 N.Y.S. 2d 863, 867 (1970):

> The simple and ineradicable fact is that voluntary arbitration and compulsory arbitration are fundamentally different if only because one may, under our system, consent to almost any restriction upon or deprivation of right, but similar restrictions or deprivations if compelled by government, must accord with procedural and substantive due process.

708 F. Supp. 95, at 96-97.

The court thereupon rejected petitioner's reasoning as follows:

> Indeed, under Karmen's strained interpretation of *Mount St. Mary's*, all arbitrations could be subject to due process limitations through the simple act of appealing the arbitrator's decisions to the court system. Such a situation would negate the purpose of Article 75 which has long had an important function.

*Id.* at 97.

Since the underlying voluntary arbitration action was private, the mere confirmation by the state court did not give rise to any state action, especially in light of the petitioner's failure to allege any independent wrong committed by the state court or "something more" than the mere ministerial act of confirmation. To hold otherwise would in the words of the District Court, "negate the purpose of Article 75" and render every private arbitration decision subject to collateral attack by virtue of mere confirmation by a state court.

Finally, the underlying claim raised by petitioner does not offend some principle of justice so rooted in the traditions and conscience of our people so as to be ranked as fundamental and to warrant interference with the power of the state to regulate procedures under which its laws are carried out. *Patterson v. New York*, 432 U.S. 197, 201-202 (1977).

Were this Court to find state action in the mere ministerial act of a state court's confirmation of an arbitration award, then the floodgates of litigation would open to every disgruntled party to an arbitration. This would defeat the long stated federal and New York State policy of favoring arbitration as a method of dispute determination.

## II.

**A disclosed business relationship is not a constitutionally recognized ground for vacatur.**

Both the lower Court and the Appellate Division found that the alleged business relationship between Mirzoeff and Kaufman, if true, was obviously disclosed to Mirzoeff. The cases dealing with "undisclosed" business relationships cited by petitioner are

simply not relevant to the facts of this case.

*Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), relied on heavily by petitioner, involved an *undisclosed* business relationship between the *only* neutral arbitrator and the prevailing party in an arbitration conducted under the United States Arbitration Act. There, the Court limited its ruling requiring vacatur of an award based on nondisclosure to arbitrations arising under the federal statute.

While the Court in *Commonwealth*, citing *Tumey v. Ohio*, 273 U.S. 510 (1927) declared that the rule presuming bias based on undisclosed facts of a pecuniary interest was a constitutional one in the case of courts, it did not extend this rule to arbitration cases arising under state law. Justice White in his concurring opinion (joined by Justice Marshall) explained that the decision does not hold arbitrators to standards of "judicial decorum." Parenthetically, Justice White also recognized that an award would not be vacated if a party failed to object to a disclosed relationship.

The other state cases cited by petitioner also involve "undisclosed" business relations. Clearly, none of these cases are applicable here where the relationship was a disclosed one and petitioner failed to object. Petitioner has failed to cite even one case where a disclosed relationship was the basis for vacatur of an award.

In *Aetna Life Insurance v. Lavoie*, 475 U.S. 813, 827-828 (1986) the Court declined to extend the rule requiring reversal of a judgment to a situation where the disqualified judge's vote was mere surplusage.[3]

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3. The Court in *Aetna Life Insurance v. Lavoie*, 475 U.S. 813, 825-826 at fn. 3, specifically criticized the *Commonwealth Coatings Corp.* decision in (Cont'd)

In *Commonwealth, supra,* the failure of the *sole* neutral arbitrator to disclose the prior business relationship resulted in his disqualification. In *Aetna*, the disqualified judge's vote was decisive in a five to four decision. *Tumey, supra,* involved a single judge.

In our case, however, even if Kaufman was disqualified, his vote was mere surplusage under the five to none unanimous decision. New York courts have consistently upheld arbitration decisions where the vote of the "disqualified" or "biased" arbitrator was mere surplusage. *Lastmor Products Manufacturing Corp. v. Storozom,* 279 App. Div. 748, 108 N.Y.S. 2d 317 (2nd Dep't 1951), *aff'd.*, 304 N.Y. 597 (1952); *St. George Textile Corp. v. Brookside Mills Inc., N.O.R.*, 85 N.Y.S. 2d 621 (Sup. Ct. N.Y. Co. 1948).

## III.

**Petitioner waived his objections to the arbitrators.**

As an additional ground in support of confirmation, both the lower court and the Appellate Division found that under New York law, petitioner had waived objections to the arbitrators based on facts clearly disclosed to him (6-7a, 11-12a). *See, e.g., Matter of Siegel (Lewis),* 40 N.Y. 2d 687, 690, 389 N.Y.S. 2d 800, 802, 358 N.E. 2d 484, 486 (1976); *J.P. Stevens and Co. v. Rytex Corp.*, 34 N.Y. 2d 123, 129, 356 N.Y.S. 2d 278, 282, 312 N.E. 2d 466, 469 (1974); *Cross Properties v. Gimbal Bros. Inc.*, 15 A.D. 2d 913, 225 N.Y.S. 2d 1014, 1016 (First Dep't 1962), *aff'd.*, 12 N.Y. 2d 806, 236 N.Y.S. 2d 61, 187 N.E. 2d 129 (1962); *Sterling Cheek*

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(Cont'd)
reading *Tumey v. Ohio* as constitutionalizing any rule that a decision rendered by a judge with the "slightest pecuniary interest" constitutes a violation of the Due Process Clause.

*v. Chubb & Son Inc.*, 70 A.D. 2d 622, 416 N.Y.S. 2d 313, 314 (2nd Dep't 1979); *East India Trading Co. v. Carmel Exporters and Importers Ltd.*, 97 N.Y.S. 2d 556, 559-560 (Sup. Ct. N.Y. Co. 1950), *aff'd.*, 278 App. Div. 757, 103 N.Y.S. 2d 1021 (First Dep't 1951).

The finding of petitioner's waiver was further buttressed by petitioner's continuation of the arbitration without written objection as required by Section 13 of the DDC arbitration by-laws (7ra). In fact, although petitioner's counsel did file written objection concerning evidentiary rulings (8ra), no objection was filed with respect to the arbitrator's alleged impartiality.

Contrary to petitioner's present contentions, his silence in failing to object to the arbitrator was deliberate and knowing behavior unlike the facts in *Johnson v. Zerbst*, 304 U.S. 458 (1938) where a defendant's waiver of his right to counsel in a criminal matter was in issue. Here, petitioner was represented by an attorney who was a former general counsel to the DDC (24a).

Furthermore, the waiver was not of a "constitutional principle" but of the evidentiary right to object to an arbitrator selected by the party in the context of this fact situation where petitioner with full knowledge of the facts chose not to object.

Finally, the equitable doctrine of unclean hands should be applied to bar the petitioner from coming forward after an adverse decision when he kept *his* conduct secret from his adversary in the hopes of possibly influencing the arbitrator to render a decision in his favor.

## IV.

**The state court's factfinding is not reviewable under the circumstances of this case.**

The Supreme Court has stated that it will normally not disturb a state court's finding of fact. ". . .[I]t is normally within the power of the State to regulate procedures under which its laws are carried out including the burden of producing evidence and the burden of persuasion." *Patterson v. New York, supra,* 432 U.S. at 201.

Even in a case where constitutional principles are present, unlike here, the findings of a state court concludes the Supreme Court except where the finding is wholly lacking support in evidence. *Columbe v. Connecticut,* 367 U.S. 568, 603 (1961).

The factual finding by the Appellate Division that petitioner did not sufficiently demonstrate his allegation of arbitrator's misconduct (6a) is a predicate finding of fact in a procedural context unlike the substantive, constitutional factfinding in the First Amendment cases cited by petitioner (Pet. for Cert. at 8).

Since arbitration proceedings are favored by New York law as a desirable alternative to litigation, its courts have fostered a clear judicial policy in favor of non-interference with this form of dispute resolution. *Matter of Sprinzen (Nomberg),* 46 N.Y. 2d 623, 629, 415 N.Y.S. 2d 974, 976, 389 N.E. 2d 456, 458 (1975). In furtherance of the foregoing policy, New York law places the burden of proof on a party alleging the arbitrator's bias or misconduct which must be shown "clearly and convincingly." *Ottley v. Mostoff,* 79 A.D. 2d 964, 435 N.Y.S. 2d 279, 280 (First Dep't 1981), *aff'd.,* 54 N.Y. 2d 698, 442 N.Y.S. 2d 989, 426 N.E. 2d 483 (1981); *Matter of S. Weiner Furniture Co. Inc.,* 90 A.D. 2d 875, 456 N.Y.S. 2d 474, 475-476 (Third Dep't 1982); *Goltz*

*v. Ripps*, 88 A.D.2d 1052, 452 N.Y.S. 2d 681, 682 (Third Dep't 1982).

It is within the trial court's discretion on an Article 75 application to grant confirmation based on the affidavits presented or to grant a hearing, where required. *North American Foreign Trading Corp. v. Rosen*, 73 A.D. 2d 883, 424 N.Y.S. 2d 8 (First Dep't 1980).

While the court must make a threshold determination as to the allegations, *Thermasol Ltd. v. Drieske*, 78 A.D. 2d 838, 433 N.Y.S. 2d 166, 167 (First Dep't 1980), *aff'd.*, 52 N.Y. 2d 1069, 438 N.Y.S.2d 520, 420 N.E. 2d 401 (1981), a hearing is not required based on allegations of a mere suggestion of partiality which does not satisfy the "clear and convincing" standard. *Brill v. Muller Brothers Inc.*, 22 A.D. 2d 678, 253 N.Y.S. 2d 391 (First Dep't 1964); *Perl v. General Fire & Casualty Co.* 34 A.D. 2d 748, 310 N.Y.S. 2d 196, 198 (First Dep't 1970).

Since under New York law, petitioner did not meet his procedural burden of alleging misconduct by the "clear and convincing" standard, no evidentiary hearing was required.[4]

Petitioner's reference to Rule 56(c) of the Federal Rules of Civil Procedure is not "analogous", since a disgruntled party to an arbitration who accuses an arbitrator of misconduct must satisfy a higher burden. The "clear and convincing" standard is certainly a rational one, or else every dissatisfied party to an arbitration can defeat the purpose of arbitration by a conclusory, sour grapes allegation that the arbitrator was biased or committed misconduct

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4. We submit that petitioner would have failed to satisfy his burden even under a Federal Rule 56 motion since a party opposing a motion for summary judgment is not entitled to hold back evidence until the time of trial. *Lipschutz v. Gordon Jewelry Corp.*, 373 F. Supp. 375, 384 (S.D. Texas, 1974).

in one form or another.

Petitioner's allegation concerning Kaufman's alleged misconduct was totally devoid of detail. The "low" offer for the ring was not furnished. The date, time, other circumstances and whether or not any witnesses were present was not furnished. By contrast, Kaufman submitted a detailed factual affidavit in addition to the affidavit submitted by respondent and respondent's counsel. Although petitioner was afforded an opportunity to reply to Kaufman's affidavit, he failed to do so. Under these circumstances, the lower court and the Appellate Division properly found that petitioner failed to meet the "clear and convincing" standard.

V.

**The petition is frivolous.**

We respectfully submit that the instant petition for a writ of certiorari is frivolous for several reasons. The petitioner has failed to demonstrate that a justiciable federal question is present, due to the fact that the Fourteenth Amendment due process claim was not raised in the state courts and also due to the absence of state action. *See, e g., Martin-Trigona v. Champion Federal Savings & Loan Assoc.*, 892 F.2d 575, 577 (7th Cir., 1989).

Additionally, petitioner has attempted to misrepresent the state court's clear finding of facts with respect to petitioner's failure to demonstrate the arbitrator's misconduct, the finding that the alleged bias was "disclosed" to petitioner, and by incorrectly referring to Kaufman as a "tainted" arbitrator when no bias was found by the court.

When petitioner and respondent agreed to the arbitration, they entered into a prospectively economical, favored alternative

means of civil dispute resolution. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Matter of Sprinzen, supra.*

Instead of an economical dispute resolution, respondent Namdar was given a lesson in the economics of civil litigation.

Petitioner not only vigorously contested confirmation of the award, but appealed the case through the New York court system. Petitioner, undeterred by a unanimous affirmance of the Appellate Division, moved to the Appellate Division for leave to appeal to the Court of Appeals. Upon denial of the motion without dissent, petitioner moved directly to the Court of Appeals for leave to appeal. The motion was again denied without dissent. Still unremorseful, petitioner moved for rehearing and moved to amend the remittitur to provide that a constitutional issue had been necessarily raised and considered. That motion was also denied without dissent, and petitioner filed the instant petition.

In view of the foregoing, we submit that this is an appropriate case for this Court to award respondent damages in the sum of Ten Thousand ($10,000) Dollars pursuant to Rule 42(2) of the Rules of the Supreme Court of the United States together with an award of double costs.

## CONCLUSION

The petition for a writ of certiorari should be denied and an award of damages should be granted to respondent for petitioner's filing of a frivolous petition.

Dated: New York, New York
May 31, 1991

Respectfully submitted,

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## APPENDIX A — EXCERPTS FROM AFFIRMATION OF HYMAN BRAVIN, ESQ. IN SUPPORT OF PETITIONER'S MOTION FOR LEAVE TO APPEAL DATED JULY 6, 1990

The respondent-appellant now seeks permission of this Court to appeal to the Court of Appeals on two certified questions:

1. Whether an arbitrator participating in an arbitration process can simultaneously engage in negotiations to purchase a diamond ring from a party and not disclose his self-dealing transaction to the other party and the other members of the panel?

2. Did the arbitrator who negotiated with Mirzoeff, a party, to purchase his 10-carat diamond ring and failed to disclose said negotiations to the other party and the other members of the arbitration panel commit misconduct in violation of CPLR 7511 (subd. (b) 1. cl. (i)?

## APPENDIX B — EXCERPTS OF PETITIONER'S MOTION FOR LEAVE TO APPEAL DATED NOVEMBER 13, 1990

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the

ARBITRATION OF CERTAIN CONTROVERSIES BETWEEN MOTI NAMDAR,

Petitioner-Respondent,

-against-

ELI MIRZOEFF,

Respondent-Appellant.

APPLICATION FOR LEAVE TO APPEAL

Questions Presented

This application by Respondent-Appellant, Eli Mirzoeff (hereinafter "Mirzoeff"), which warrants review by the Court, presents novel and complex questions of overriding importance to members of international and national trade associations located in New York who settle their business disputes with other members through compulsory arbitration. Both parties herein are members of the Diamond Dealers Club ("D.D.C."), the leading diamond bourse in the world, which has its own arbitration panels, made up of elected members:

1. Whether an arbitrator participating in arbitration hearings can simultaneously engage in negotiations to

purchase a diamond ring from Mirzoeff, a party and not disclose his self-dealing transaction to the other party and the other members of the arbitration panel?

2. Did the arbitrator who negotiated with Mirzoeff, a party, to purchase his 10-carat diamond ring and failed to disclose said negotiations to the other party and the other members of the arbitration panel commit misconduct in violation of CPLR 7511.

## APPENDIX C — EXCERPTS OF AFFIDAVIT OF ABE KAUFMAN SWORN TO ON APRIL 29, 1988

12. The proceedings were conducted with civility and in accordance with the due process rights of all concerned parties. Both sides, represented by counsel, presented their documents and witnesses and their respective attorneys conducted extensive cross-examination.

13. During the course of the proceedings, there was not at any time any objection by the parties or counsel to the members of the panel and there were no charges of bias or prejudice. Further, no objections were made by Mr. Mirzoeff or his attorney at the proceeding of the matters which he now raises in his papers. This is the first time I have heard of such objections.

14. At the conclusion of the arbitration, the arbitrators examined and reviewed all of the facts as sophisticated merchants in accordance with their understanding of American Civil Law and trade customs and practices. There was no bias or prejudice in any of the deliberations or conduct of the proceedings. There was no discussion of Jewish Law in the conduct of the proceedings or in the deliberations.

* * *

23. The matter of the diamond ring played no part in my deliberations with the other members of the Panel. In fact, on February 9, 1988 when we concluded the hearing and commenced deliberations, it was a dead issue in my mind. Mr. Mirzoeff had not gotten back to me concerning anything relating to the ring. Since I had no great interest in purchasing this ring, and since there was nothing further pending, I wasn't even consciously aware of this matter. The unanimous award by the arbitrators was based solely on the facts presented and our understanding of the

applicable law. There was absolutely no bias or prejudice in the conduct of the proceeding, the deliberations thereon and the rendering of the award.

## APPENDIX D — EXCERPTS FROM AFFIRMATION OF BENJAMIN P. EISENBERGER, ESQ. DATED APRIL 20, 1988

4. Mr. Mirzoeff raised the defense that the sapphire had been returned to Mr. Namdar's brother-in-law in the elevator of the building wherein Mr. Namdar's offices are located. Mr. Namdar's brother-in-law denied these charges. It was undisputed that Mr. Namdar retained possession of the original memorandum signed by Mr. Mirzoeff's authorized agent. Section 4 of Article *XIX* of the Diamond Dealers Club Inc. by-laws, relating to custom and usage trade rules, is the controlling section. Section 4 states as follows:

> "Memorandums. No goods shall be given or received without a signed memorandum, and *any return of goods must be acknowledged in writing or by the return of the signed memorandum.*" (emphasis added)

## APPENDIX E — EXCERPTS OF EXHIBIT ATTACHED TO AFFIDAVIT OF ABE KAUFMAN SWORN TO ON APRIL 29, 1988

Sec.13b. Hearing: The parties are entitled to be heard, to present evidence, to cross-examine witnesses and have the right to be represented by an attorney. Nowithstanding the failure of a party duly notified to appear, the arbitrators may hear and determine the controversy upon the evidence produced.

Sec.13c. Waiver: Except the right to representation by an attorney a requirement of section 13b may be waived by written consent of the parties and it is waived if the parties continue with the arbitration without written objection.

## APPENDIX F — EXCERPTS OF AFFIRMATION OF HYMAN BRAVIN, ESQ. DATED MAY 19, 1988

5. As another point, I call the attention of the Court to the fact that the last session of the Appeal Committee took place on February 9, 1988. During the last session, in my professional opinion, a prejudicial and inaccurate statement was made by the attorney for NISSIM/NAMDAR. I wrote a protesting letter to KAUFMAN; hand-delivered it with enough copies for each member of the Appeal Committee Panel; and also hand-delivered a copy to said attorney for the complainants. I append* as Exhibit "4" a copy of my February 10, 1988 letter along with the reply of the attorney for NISSIM/NAMDAR, dated February 11, 1988. It is submitted that KAUFMAN received both letters *before* a decision was rendered on February *12* (*not* February "10" as stated in KAUFMAN's affidavit of April 29, 1988).

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* Omitted herein.